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FEDERAL TRADE COMMISSION

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For The Record, Inc.

(301) 870-8025 - www.ftrinc.net - (800) 921-5555

FEDERAL TRADE COMMISSION

IN THE MATTER OF:)
CAN-SPAM REPORT TO CONGRESS.)
) Matter No.:
) P044405
)
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WEDNESDAY, JULY 27, 2005
AM SESSION
Federal Trade Commission
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

The above-entitled matter came on for conference, pursuant to agreement, at 10:05 a.m.

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2 ON BEHALF OF THE FEDERAL TRADE COMMISSION:

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9

10 ALSO PRESENT VIA TELEPHONE:

11 JIM HALPERT, Internet Commerce Coalition

12 JIM BARSZCZ, AT&T

13 LIZ GASSTER, AT&T

14 BETSY BRADY, Microsoft

15 JOSHUA GOODMAN, Microsoft

16 AARON KORNBLUM, Microsoft

17 JOHN ST. CLAIR, MCI

18 MAGGIE MANSOURKIA, MCI

19 JENNIFER JACOBSEN, AOL/Time Warner

20 STUART INGIS, Piper Rudnick

21 JENNIFER ARCHIE, AOL

22 JULIE CLOCKER, Verizon

23 KIMBERLY ADDICOTT, Verizon

24 THOMAS DAILEY, Verizon

25 ELIZABETH BOWLES, Aristotle

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1 P R O C E E D I N G S

2 - - - - -

3 MR. DAVIS: Good morning, everyone. This is
4 Mike Davis, and I'm an attorney at the Federal Trade
5 Commission in Washington. The chairperson is Katie
6 Harrington-McBride. However, she will be coming to our
7 conference in just a few minutes. She's not here. I'm
8 also joined in the conference room here in Washington by
9 Allyson Himelfarb, an investigator at the FTC. I
10 understand that Debbie, a court reporter with For The
11 Record, is also on the line. Is that right, Debbie?

12 MS. MAHEUX: Yes, it is, Mike. Thank you.

13 MR. DAVIS: So, Debbie, are you ready to start?

14 MS. MAHEUX: Yes, I am, Mike.

15 MR. DAVIS: Great. Thank you. And also just
16 joining us now in the conference room here in Washington
17 is Katie Harrington-McBride, an attorney here at the
18 FTC.

19 MS. HARRINGTON-MCBRIDE: Good morning,
20 everybody.

21 MR. DAVIS: Thank you all for joining us. We
22 plan to have a talk with you for about the next two
23 hours to discuss the effectiveness and the enforcement
24 of the federal CAN-SPAM Act. Before we get started, I
25 would like to do a call of the roll.

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1 This call is a little bit larger than some of
2 the calls we're having in a two-week period, and in
3 order to try to help out our court reporter, Debbie, we
4 will have a specific request for you, and that would be
5 when you're ready to speak, if you'll say your full name
6 and the organization that you're with, that will help
7 her not only get used to the sound of your voice but
8 also know exactly who is speaking so that the record is
9 clear.

10 It looks like we have a couple of Jims
11 potentially today, and maybe a few other folks with
12 similar sounding names, so it will be important for you
13 to clearly state your name when speaking.

14 Let's see if Jim Halpert is on the line.

15 MR. HALPERT: Yes, I am, representing the
16 Internet Commerce Coalition.

17 MR. DAVIS: Good morning, Jim. Jim Barszcz, if
18 I'm pronouncing it correctly?

19 MR. BARSZCZ: It's just Barszcz.

20 MR. DAVIS: Okay, Jim, good morning. Liz
21 Gasster? Is there anyone else, Jim, that you're aware
22 of from AT&T this morning?

23 MR. BARSZCZ: No. It should be just Liz and me.

24 MR. DAVIS: So I guess Liz is not on the line
25 yet. How about Gerard Lewis?

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1 MR. HALPERT: I'm not sure, Gerry, are you on
2 the line? They are a member of the Internet Commerce
3 Coalition and gave me a bunch of information before the
4 call.

5 MR. DAVIS: We had received an indication that
6 he may not be able to make it, so we will indicate that
7 they're not here yet.

8 MR. HALPERT: I can forward any questions that
9 you have for Comcast, if that's helpful.

10 MR. DAVIS: Okay. Let me first make sure there
11 is no one on the line from Comcast. Okay.

12 How about Dina Wong? Dina Wong from Yahoo?

13 Alan Davidson from Google?

14 Betsy Brady with Microsoft? Betsy Brady?

15 MS. BRADY: Here.

16 MR. DAVIS: Okay, Betsy.

17 MS. BRADY: Thank you.

18 MR. DAVIS: Joshua Goodman also with Microsoft?

19 MR. GOODMAN: I'm here.

20 MR. DAVIS: How about Aaron Kornblum?

21 MR. KORNBLUM: Good morning, I'm here.

22 MR. DAVIS: Anyone else with Microsoft?

23 How about Maggie Mansourkia? Sorry about that,
24 Maggie.

25 MS. MANSOURKIA: No, that was great.

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1 MR. DAVIS: Oh, good. John St. Clair?

2 MR. ST. CLAIR: Good morning.

3 MR. DAVIS: Good morning. Jennifer Jacobsen?

4 MS. JACOBSEN: Yes, I'm here from Time Warner,
5 and I'm joined by two people who are representing us and
6 AOL here, Stu Ingis and Jennifer Archie, who are two
7 outside counsel.

8 MR. DAVIS: Jennifer, J E N N I F E R?

9 MS. JACOBSEN: Right.

10 MR. DAVIS: Then Archie.

11 MS. JACOBSEN: A R C H I E

12 MR. DAVIS: Very good. Thanks to the three you.
13 How about Lloyd Nault? Anyone with BellSouth this
14 morning?

15 MR. HALPERT: They're an Internet Commerce
16 Coalition member again, and I can forward any questions
17 you have for them.

18 MR. DAVIS: All right. Thanks. I guess that
19 was Jim Halpert?

20 MR. HALPERT: Correct.

21 MR. DAVIS: Thanks, Jim. Maybe three people
22 from Verizon, Julie Clocker.

23 MS. CLOCKER: Here.

24 MR. DAVIS: All right, Julie. Kimberly
25 Addicott?

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1 MS. ADDICOTT: I'm here.

2 MR. DAVIS: Thomas Dailey.

3 MR. DAILEY: I'm here.

4 MR. DAVIS: Anyone else from Verizon? And
5 Elizabeth Bowles.

6 MS. BOWLES: Bowles.

7 MR. DAVIS: Bowles, Elizabeth, good morning.

8 MS. BOWLES: Good morning.

9 MR. DAVIS: Is there anyone else not from the
10 FTC on the line.

11 MS. GASSTER: Liz Gasster from AT&T just joined.
12 I'm sorry to be a couple minutes late.

13 MR. DAVIS: Hi, Liz.

14 MS. GASSTER: Hi.

15 MR. DAVIS: Very good. So also we might have a
16 couple of folks from our Bureau of Economics at the FTC.
17 Is anyone on the line?

18 MR. HADEISHI: Yes, Haj Hadeishi here.

19 MR. DAVIS: Haj Hadeishi is from the FTC's
20 Bureau of Economics, and perhaps Lou Silversin will be
21 joining us later, but apparently he's not on right now.

22 Okay. Debbie, do you have any thoughts about
23 this large group or should we just get started?

24 MS. MAHEUX: We can just get started, but please
25 make sure you state your names and speak close to your

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1 microphones.

2 MR. DAVIS: In December of 2003, Congress
3 enacted and the President signed the CAN-SPAM Act which
4 among other things directed the FTC to report on the
5 effectiveness and enforcement of the CAN-SPAM Act.
6 FTC's report is due to Congress by middle of December,
7 this coming December.

8 The FTC has been gathering data since the
9 passage of the Act, and this interview is with Internet
10 service providers, and I realize that some of your
11 companies are large and there may be other business
12 units in addition to the ISP units, but for the sake of
13 brevity, I'll just consider most folks on the line to be
14 affiliated in one way or another with an ISP.

15 This interview will be transcribed for the
16 record and will be part of the record for the report.
17 This interview is just one of several ways the FTC is
18 seeking information that would be relevant for the
19 record on the effectiveness and enforcement of the Act.

20 Because today's call is being transcribed for
21 the record by a court reporter who is listening to the
22 call, it is very important that when you wish to speak,
23 you begin by stating your name and your affiliation.
24 For example, this is Mike Davis with the FTC. If you
25 don't remember, one of us may speak up and stop you and

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1 ask you to identify yourself, but the call will proceed
2 much more efficiently if you make a note of this now.

3 Finally, and to be absolutely clear, your views
4 expressed here today will be transcribed for the record
5 and may be appended to the report to Congress or
6 otherwise made public, just so everyone is clear on
7 that.

8 Are there any questions before we begin?

9 MS. BRADY: This is Betsy Brady. I have two
10 questions for you.

11 MR. DAVIS: All right, Betsy.

12 MS. BRADY: One is will we have a chance to take
13 a look at the transcript before it's finalized?

14 MR. DAVIS: The answer is yes. I have something
15 to say about that at the end of the call, but basically
16 the transcript will be circulated to everyone by Allyson
17 Himelfarb, who is the person who invited you to attend
18 this call, and we'll be asking for a fairly quick
19 turnaround, and we'll be asking for you to send back
20 your changes in red line format, so that we'll be able
21 to see what changes you're asking for, and that will
22 happen I think about 10 days, 12 days after the call,
23 some time like that.

24 MS. BRADY: My other quick question is: Is
25 there a way to supplement the record of this call if

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1 during the course of the call we get a question that we
2 want to weigh in but can't do so immediately?

3 MR. DAVIS: Yes, we invite that, and one way to
4 do it would be to send me an Email message, and I'll
5 give you my Email address later, but I'll also give it
6 to you quickly now. Mdavis@ftc.gov, M as in Mike, D A V
7 I S @ F T C . G O V.

8 MS. BRADY: Thank you very much, Mike.

9 MR. DAVIS: Thanks. Well, here's what we have
10 in mind for today. We're going to cover four main
11 topics on this call. The first will be marketplace
12 developments or technological changes since the passage
13 of the Act, in December of 2003, that may affect the
14 practicality or effectiveness of the Act, and this might
15 include developments that you're aware of and some that
16 we may be aware of, perhaps changes in filtering,
17 methods of authentication, new or increasing use of non-
18 traditional devices for receiving Email like hand-held
19 devices and cell phones, et cetera.

20 Secondly, we'll move into an area about the
21 extent to which the international transmission of Email
22 may affect the effectiveness of the Act and suggestions
23 for changes, so that will be about offshore computers.

24 The third topic is about ways in which
25 consumers, especially children, can be protected from

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1 obscene and pornographic material and will be
2 referencing the FTC's Brown Paper Wrapper/sexually
3 explicit rule from 2004.

4 Finally, the fourth topic will be a march
5 through the provisions of the CAN-SPAM Act, taking them
6 one by one, and discussing thoughts that you have about
7 the effectiveness and enforcement of each provision in
8 the CAN-SPAM Act.

9 For each of these four main areas, I will ask a
10 series of questions, and again ask that if you have any
11 information responsive to any of the questions, you
12 please verbally signal your interest and state your name
13 and your organization, and we will call on you, and then
14 you can begin to provide your answer.

15 Also, since this is a technical area, and all of
16 you are experts in this area, there may be, from time to
17 time, a term or an acronym that some of us may not be
18 familiar with, and to ensure that we have a clean
19 record, we may ask that you just spell out for us what
20 the concept is that you're describing. We would like to
21 have a record that even moderately sophisticated readers
22 can understand and enjoy.

23 So let's get started with the first issue, which
24 is regarding marketplace developments or technological
25 changes since the passage of CAN-SPAM in 2003 that may

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1 affect the practicality or effectiveness of the Act, and
2 I'll just start off with a specific question, whether
3 you think there are any new or increasingly used methods
4 for receiving Email used by consumers such as cell
5 phones and hand-held Email devices and others, and if
6 so, do those developments impact the practicality or
7 effectiveness of the CAN-SPAM Act?

8 MS. HARRINGTON-MCBRIDE: Just so we don't stump
9 the panel, this is Katie. I guess one thing I would
10 like to say about the scope of your remarks here, and I
11 recognize we've told you 17 times that you're going to
12 be transcribed here and are on the record, but I hope
13 that that won't mean that if you know something
14 anecdotally, you won't feel free to mention it, because
15 obviously you all bring a great expertise to the table.

16 We had an ongoing dialogue with all of you
17 before the CAN-SPAM Act, and certainly since its
18 passage, but if there is information not that you come
19 into possession of because of the work that you do or at
20 your day job, but because of additional reading that you
21 do or there are studies that you may have seen or other
22 data sources you would want to point us to, please feel
23 free in this call to so state and to let us know about
24 those sources.

25 This doesn't have to be from personal knowledge

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1 that you speak.

2 MR. GOODMAN: This is Joshua Goodman from
3 Microsoft.

4 MR. DAVIS: Hi, Joshua.

5 MR. GOODMAN: The reason I'm being quiet is that
6 I personally am not aware of important technical changes
7 since the passage of the Act. There haven't been, that
8 I'm aware of, big changes in how people access their
9 Email. There have been small growths in certain areas
10 but not enough to impact things substantially.

11 MR. DAVIS: Let me ask a specific question,
12 whether you have any thoughts on whether wireless
13 devices are capable of accessing, for example, opt-out
14 links or whether small hand-held devices display a
15 sufficient amount of characters for the subject line to
16 display something like the sexually explicit labeling
17 requirement?

18 MR. GOODMAN: Well, certainly, you know, the
19 subject line, since that comes at the very beginning, if
20 you can see any part of the subject, you're going to see
21 that. As far as opt-out links, that depends on the
22 particular device, but I think there are relatively few
23 people -- first off, many people don't use the opt-out
24 links, even when they're available, and second off, I
25 think there are relatively few people who access their

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1 Email mostly or exclusively from such a small device,
2 and so when they got back to a larger computer, if they
3 couldn't do it from that device, they could certainly do
4 it some other way.

5 Also sometimes it isn't an opt-out link.
6 Sometimes it's an instruction to say reply to the
7 particular message, and typically if you can read mail,
8 you can also send it, so you can certainly imagine
9 people for whom it's a problem, but it would probably be
10 a relatively small number.

11 MR. DAVIS: That was Joshua Goodman?

12 MR. GOODMAN: Yes.

13 MR. DAVIS: Thank you.

14 MS. BOWLES: This is Elizabeth Bowles. I
15 actually use one of those to check my mail, and as far
16 as I know, the opt-out links work, but I don't
17 personally use them, just to back up what Josh just
18 said. I don't use opt-out links, but if I did, they
19 would work on my hand-held device.

20 MR. DAVIS: Thank you. While we're speaking
21 about opt-out, let me ask you whether you might have any
22 information, perhaps any data or if you've seen any
23 study that supports what might be some form of
24 conventional wisdom that if a user chooses to do some
25 sort of unsubscribe or opting out, it might result in

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1 negative consequences.

2 One such consequence could be actually
3 subjecting themselves to more unsolicited commercial
4 Email. Another consequence could be that there might be
5 some exposure to certain types of malware. I'm
6 wondering if you have any information or any thoughts
7 about that, any dangers, so to speak, associated with
8 unsubscribing or opting out.

9 MS. MANSOURKIA: This is Maggie Mansourkia.
10 I'll go ahead and say something about that, which is
11 that I certainly don't have any specific numbers or
12 exact data as to how often there would be a negative
13 consequence, but I think going back to Katie's request
14 that we include just general knowledge and anecdotal
15 evidence, I think most heavy users of Email generally
16 shy away from clicking on opt-out buttons or sending
17 opt-out requests, unless it's a very well established
18 company or business, and they know they can rely on that
19 company because of its brand or because of the
20 relationship or what have you.

21 By the way, those are most of the companies in,
22 which case that they would not want to click on the
23 opt-out button because they do want to receive Emails.
24 I think the general notion is that it's best to not
25 respond in any way, including the opt-out to anyone that

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1 you receive commercial Emails from whom you don't know.

2 Everyone that I have talked to regarding those,
3 that's kind of the one thing, if they don't know
4 anything else about the Act or any laws in any other
5 part of the world, if they don't happen to live in the
6 U.S., that's one thing they know, and they'll
7 immediately say, Oh, my gosh, don't touch the opt-out
8 button.

9 MR. KORNBLUM: This is Aaron Kornblum at
10 Microsoft. I think that this guidance to customers and
11 consumers is being amplified now with the onset of
12 phishing, and the guidance in the Emailed or
13 generally --

14 MS. MAHEUX: Mr. Kornblum, you are not coming in
15 very clearly, I'm sorry.

16 MR. KORNBLUM: -- to consumers not to click on
17 Emails or generally, and I think that that could include
18 or be interpreted to be any links in the Email.

19 MR. DAVIS: Why don't we switch away from
20 opt-out for a moment, and let me ask you specifically
21 whether there have been any changes to Email filtering
22 that affect the practicality or effectiveness of the
23 Act's, and if you don't think there has been much in the
24 last 19 months, I wonder if you would like to answer in
25 the alternative, about what may be in the near future,

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1 the next four months, eight months, anything that you
2 crystal ball allows you to see in say the near term
3 going forward.

4 (Discussion off the record.)

5 MS. JACOBSEN: This is Jennifer Jacobson from
6 Time Warner. Speaking on behalf of AOL I would say that
7 there has been a steady increase in the effectiveness of
8 an innovation of technological tools, both on the back
9 end in terms of what we're seeing on the network side,
10 and also on the front end with what the consumers see,
11 what the consumer sees and have available to them to do
12 their own sort of filtering within their inbox, and we
13 think this has led to reduction in spam in people's
14 inboxes.

15 MS. GASSTER: This is Liz Gasster with AT&T, and
16 we would second what Jen Jacobsen has said. We're
17 using, as I'm sure all others on the call are, a variety
18 of technologies, not just filtering, that are making a
19 difference both in our networks in terms of what we
20 carry on our backbone, but certainly in the consumers'
21 inbox improving that situation, and Jim Barszcz, who is
22 on the line also from AT&T, may have additional detail
23 there, but we would second that experience.

24 MS. HARRINGTON-MCBRIDE: This is Katie. Is
25 there a short list of technologies you could list for us

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1 beyond filtering that you are using as a backbone?

2 MR. BARSZCZ: This is Jim Barszcz from AT&T.

3 Well, we're a big company, and we're doing various
4 things in various parts of it. In our ISP business, we
5 are most concerned with identifying IP addresses that
6 send us spam predominantly. I don't know if that's at
7 the right level of specificity, but that's where I would
8 begin.

9 MS. HARRINGTON-MCBRIDE: Okay. I am obviously
10 much more of a novice than any of you on the call, but
11 that sounds like a kind of filtering, identifying where
12 it's coming from and blocking it.

13 MR. BARSZCZ: Blocking is different from
14 filtering. We track the history of the IPs that send us
15 mail. If we know that the stream of mail consists
16 mostly of spam, we'll block all mail from that IP.
17 (Chances are that the remaining mail from that IP will
18 also be spam -- we just didn't recognize it.)

19 If I can also mention, right now a huge portion
20 of our spam, incoming spam, is not borderline mail from
21 marketers who might be following rules or might not be
22 following rules, but it's mail being sent through zombie
23 networks. It's undoubtedly spam, and it's coming
24 offshore from compromised end-user's machines.

25 So it's not mail that is likely to be affected

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1 or controlled by regulation at this point.

2 MS. HARRINGTON-MCBRIDE: Okay.

3 MS. BOWLES: This is Elizabeth Bowles with
4 Aristotle. We actually are significantly smaller than a
5 lot of the ISPs on the phone, but we do a similar thing
6 to what Jim was just referring to. We have dual levels,
7 and we don't call the first level a filtering, but it is
8 a block. We do look at IP addresses, and if we
9 determine that an IP is sending close to 100 percent
10 spam, we'll block it at the outset.

11 And that represents about 80 percent of the spam
12 that comes into our market, so I would second what Jim
13 just said about where the spam is coming from, being 80
14 percent of the stuff coming into our network is coming
15 from machines that just do that, and then the other 20
16 percent we send through what are traditionally
17 considered filtering systems where we actually analyze
18 each piece and say, Okay, this is spam, this isn't, and
19 then we deliver the legitimate mail.

20 That's been very successful for us. We have an
21 almost zero percent false positive rate. For
22 newsletters and things like that that actually are not
23 technically spam get through, but we block virtually 100
24 percent of things that are considered spam by our
25 customers.

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1 MS. HARRINGTON-MCBRIDE: Okay.

2 MR. GOODMAN: This is Joshua Goodman again. So
3 without going into too much detail about the specific
4 technologies, we certainly have been making a lot of
5 progress both in terms of developing new technologies,
6 but also in terms of deploying the technologies that we
7 knew about or had started, so sometimes it takes awhile
8 for a product cycle to get stuff out there.

9 Since the passage of the Act, we've shipped our
10 filters and improvements to our filters on many more of
11 our Email products. Also I think around the time the
12 Act passed, there were still some people who had very
13 little or no filtering, and now I personally don't know
14 anybody without filtering, although I'm sure there are a
15 few people.

16 The other thing I wanted to comment on is that I
17 also attended a conference on anti-spam, which was a
18 semi-academic conference that we held just last week,
19 and we had about 26 papers, and of those about 15 were
20 about future ways to improve spam filtering even more,
21 and so you can definitely see the technology moving
22 forward as we go in to the future.

23 MR. DAVIS: Why don't we move on to any
24 exchanges regarding authentication and how that might be
25 affecting the practicality or effectiveness of the

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1 CAN-SPAM Act.

2 MR. GOODMAN: This is Joshua Goodman again. I
3 want to comment on a common misperception about
4 authentication, which is some people think that if you
5 know the identity of the sender, you'll be able to stop
6 all spam, and because it's so easy to get new identities
7 or to find people whose identity doesn't have a
8 reputation, that's not the primary goal of most
9 authentication systems.

10 The primary goal is to allow good senders to get
11 a good reputation, and to allow things like safe listing
12 to work so that you can put somebody on your safe list
13 and then not have a spammer pretend to be that person
14 and get through your filter and to prevent various kinds
15 of fraud. So we see authentication as a key part of
16 anti-spam strategy, but people shouldn't expect that
17 even if we had 100 percent adoption, that it would solve
18 the spam problem.

19 MS. JACOBSEN: This is Jennifer Jacobson. From
20 AOL's perspective, we would echo that exactly. We think
21 that's exactly right.

22 MR. DAVIS: Let me ask whether there are any
23 marketplace developments or technological changes that
24 we haven't yet talked about that you think might affect
25 the practicality or the effectiveness of the Act?

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1 Maybe we could go back to Jim Barszcz's point
2 about zombie drones, which are innocent user's machines
3 hijacked by spammers as a result of insecure
4 connections. Do you think the use of spammers by
5 zombies or networks have had an impact on the
6 effectiveness of CAN-SPAM?

7 MR. BARSZCZ: This is Jim Barszcz again. Part
8 of the way CAN-SPAM is supposed to work, as I understand
9 it, is to allow for companies to sue spammers. The
10 prevalence of zombie networks makes it very difficult to
11 identify who the bad actors are. I think it's less
12 likely that there would be any kind of action taken
13 against spam that's coming in through those means.

14 MR. HALPERT: This is Jim Halpert for the
15 Internet Commerce Coalition, and the CAN-SPAM Act was
16 actually very forward looking. Both AOL and the
17 Internet Commerce Coalition pushed very hard to give
18 prosecutors tools to seek criminal penalties against
19 spammers who engage in this behavior.

20 As we have heard, the problem is that a lot of
21 it goes on in other countries, but sometimes one can
22 trace that activity back to these spammers who live in
23 the United States. This is, above all, an international
24 enforcement challenge though and something that we hope
25 that U.S. government will raise with Interpol and other

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1 international law enforcement because to the extent that
2 there is swift cooperation in terms of sharing evidence,
3 it's easier to track how it has happened and often to
4 find somebody who actually does do business in the
5 United States and is trying to hide their trails. So
6 that's really an enforcement issue.

7 The tools are in the CAN-SPAM Act, and we are
8 somewhat disappointed that the prosecutors, while the
9 FTC has done civil enforcement, have not chosen to use
10 some of the criminal tools that we worked very hard to
11 make sure are part of the Act, and we believe that many
12 of the hard core spammers in the United States can and
13 should be in jail right now, and while that will not
14 eliminate ultimately the flow of Email that comes from
15 outside of the country and is originated outside of this
16 country, it will send a strong message to people who are
17 thinking of getting into this business in the United
18 States that crime does not pay.

19 Right now civil enforcement is inadequate given
20 the nature of these people's businesses. They're shady
21 operators, and the thought that they might go bankrupt
22 is an insufficient deterrent to keep them from engaging
23 in spam.

24 So this is a point that really the CAN-SPAM Act
25 right now is ahead of enforcement practice, but if

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1 government resources are devoted to that, rather than
2 passing any sort new enough laws, would be the best way
3 to deter spam in the United States.

4 MR. DAVIS: Does anyone think that spammers can
5 facially comply with the CAN-SPAM Act, sort of including
6 opt-out, that they noted that they are selling something
7 and that this is an advertisement but then otherwise use
8 new technology to customize their messages or their
9 campaigns to avoid detection as a source of large
10 volumes of spam?

11 MS. ARCHIE: This is Jennifer Archie for America
12 Online. I would think that at least for the one client
13 I've served in this area, it's really not possible to
14 end up in the member's inbox without doing something
15 that violates the criminal provisions of CAN-SPAM
16 anymore because you must be, by definition, deceiving
17 filters, and the particular methods may vary and evolve
18 and morph, but our experience has been that when we find
19 a significant fingerprint, we've never not been able to
20 identify a U.S. actor to go after, at least uncover the
21 identity.

22 They may turn up in the Philippines or Costa
23 Rica or here or there, but they have always done
24 something that violates the criminal, and therefore the
25 rights, consumer's right, civil liabilities,

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1 notwithstanding any other head things they might put in
2 the body of the message to give an impression of
3 compliance. There's something skewed in that header
4 every time.

5 MR. DAVIS: Let me ask one more question that
6 might be related to marketplace developments, and that
7 would be a question in reference to a survey that the
8 Pew, P E W, Organization recently released, and they
9 found that while the volume of Email has increased since
10 the passage of CAN-SPAM, actual frustration of
11 recipients seems to be lessening.

12 Is there any comment that you might have about
13 that finding?

14 MS. BOWLES: This is Elizabeth Bowles with
15 Aristotle. I think that that's because the ISPs are
16 filtering, and the consumer doesn't see it as much. At
17 least that's true of our customers. That's the feedback
18 we get back from our customers. They don't really
19 perceive that there is a huge amount of problem, but
20 there is because they personally get so little spam.

21 MR. DAILEY: This is Tom Dailey from Verizon. I
22 think the analysis, and I haven't read the report, but
23 it may be important to distinguish frustration over
24 receiving spam from frustration regarding some of the
25 other problems that spam brings with it, and I'm

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1 thinking of identity theft and issues like that, and my
2 assumption is that that's still a pretty big concern for
3 consumers, the FTC as well as ISPs and other companies
4 and entities that are affecting by it.

5 MR. HALPERT: This is Jim Halpert. By identity
6 theft, do you mean phishing?

7 MR. DAILEY: Yes.

8 MR. HALPERT: Thank you.

9 MR. BARSZCZ: This is Jim Barszcz from AT&T.
10 The trend for some time that I've observed is away from
11 graphically explicit spam messages. I think when those
12 are prevalent, customers get very upset, and when, for
13 whatever reason, the trend is away from that, then
14 there's less outrage expressed.

15 MR. DAVIS: Excuse me, Jim. That would be sort
16 of pornographic or obscene explicitness?

17 MR. BARSZCZ: Yes.

18 MR. DAVIS: Thank you. Well, I can't resist. I
19 have one more marketplace type question, and that is
20 whether you consider there to be some sort of increasing
21 movement towards broadband use and whether that may have
22 some kind of impact on the effectiveness or the
23 enforcement of the CAN-SPAM Act.

24 MR. KORNBLUM: This is Aaron Kornblum at
25 Microsoft. I think that as home users connect to the

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1 Internet using always-on connections, I think that that
2 creates more incentive to utilize some of the zombie
3 computer techniques that were mentioned previously on
4 the call.

5 Spammers or those that operate those infected
6 computers, which might be two separate groups
7 completely, see these machines as a way that they can
8 transmit spam in high volume, day or night, without the
9 knowledge of the true owner of the machine, and so
10 unlike a dial up connection which is on or perhaps
11 connected to the Internet for a short period of time,
12 those always-on connections provide always-available
13 opportunities to infect and to hijack home machines and
14 then use them to transmit spam through relays.

15 I also wanted to add or amplify a comment
16 concerning the overseas spam connection, and I think
17 that the FTC's participation in the London Action Plan,
18 which is a group focused on enforcement across borders
19 and the sharing of information, I think is very exciting
20 and encouraging, and I think it's important to push
21 other international agencies to cooperate more in this
22 space.

23 I think that for some time there's been an
24 understanding that most spam originates in the United
25 States and that the problem is ours to solve, but we're

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1 seeing more evidence of spammers moving their equipment,
2 utilizing equipment overseas, and actually in some cases
3 relocating themselves physically overseas in an attempt
4 to escape CAN-SPAM, which I think is anecdotal evidence
5 that CAN-SPAM is impacting them. So we're very
6 encouraged.

7 I know that Tom Dailey was at the London Action
8 Plan kickoff last year as well, and I think it's a very
9 important collaborative approach by international
10 organizations and enforcers, and we are encouraged to
11 see that and excited to see more work specifically on
12 that project.

13 MS. MANSOURKIA: This is Maggie Mansourkia. I
14 agree with everything that the previous speaker just
15 said regarding the London Action Plan, but I do think
16 that it's important for the FTC to really look at that
17 program and see where and how it needs additional
18 efforts and additional resources.

19 I, a few weeks ago, had an opportunity to be in
20 Europe and speak with quite a few different European
21 based ISPs, and it sounded like to most of them the
22 message they were getting from their with respective
23 governments was that the London Action Plan was really a
24 PR effort, and I hope that's not the case.

25 To the extent other governments are looking at
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1 it that way, I think that's really concerning and
2 frustrating, and I would hope the FTC is in fact taking
3 it seriously and is in fact giving it the resources that
4 it requires, because again, if there's a notion that the
5 CAN-SPAM Act or any other law is not going to be
6 enforced, we're really all just running in place with
7 all these regulatory rulemakings and legislations.
8 Ultimately it's enforcement that's going to make a
9 difference.

10 MR. DAVIS: Well, Maggie and Aaron, thank you
11 for providing a segue to this next topic we would like
12 to talk about. Congress is interested in having us
13 report on the international dimension, specifically
14 addressing commercial Email that originates in or is
15 transmitted through or to facilities or computers in
16 other nations, and I would like to ask to what extent
17 does commercial Email received in the United States
18 originate in or get transmitted through other countries?

19 Do you have any reliable statistics, and is
20 there a sound methodology for reaching a conclusion
21 about that?

22 MR. DAILEY: This is Tom Dailey from Verizon. I
23 think that the question of how much mail originates
24 offshore is an important one to look at. It's also a
25 fairly technical question that might be worthwhile

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1 exploring with people who are more indirectly involved
2 in management of Email systems and firewalls and so
3 forth because it's a question of how you pick up and how
4 you log and if you can log, which is an interesting
5 question, and I wish I knew the answer to it.

6 My sense is that there is a large volume, I
7 can't attach a percentage to it, that originates
8 offshore, and what I don't know is how many of the
9 zombies that are active in networks domestically and
10 abroad originate from places outside the U.S. or
11 originate within the U.S.

12 So there's this kind of a component to that
13 there may be folks on the call that can respond more
14 directly, but I think it's a fairly sophisticated
15 question to answer.

16 MR. BARSZCZ: This is Jim Barszcz from AT&T. I
17 could come up with an estimate of what percentage comes
18 from offshore. I don't have that with me, but if there
19 would be an interest in it, I could provide that.

20 I would also say that one relatively simple
21 thing that could be done is getting service providers,
22 especially offshore service providers, to deny access to
23 Port25 for their members. I believe the FTC has put out
24 some kind of press release about that, but I'm not
25 really familiar with their position. Blocking Port25

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1 would prevent or help to prevent end user machines from
2 getting compromised and sending mail directly out to the
3 Internet, which is one of the ways that the zombie
4 networks work.

5 MR. GOODMAN: This is Joshua Goodman from
6 Microsoft, and I want to point people to a paper from
7 the recent conference on Email and anti-spam called
8 "Understanding how Spammers Steal your Email Address and
9 Analysis of the First Six Months of data from Project
10 Honey Pot," by Matthew Prince, and that's available at
11 www.ceas.cc, the Conference on Email and anti-spam.

12 So they did a very nice analysis focusing on web
13 harvesters and trying to understand where these people
14 were coming from, and it's a difficult technical
15 question because there are many ways to obscure things,
16 but that's the best source of information I know of to
17 answer your question.

18 MR. DAVIS: Josh, are all of the papers or most
19 of the papers from the conference now available online?

20 MR. GOODMAN: They're all available online.

21 MR. DAVIS: Thank you.

22 UNIDENTIFIED SPEAKER: Could you please repeat
23 that URL.

24 MR. GOODMAN: Www.ceas, Charlie, Echo, Alpha,
25 Sierra, .cc, dot Charlie Charlie.

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1 MR. DAVIS: Is there a general feeling that the
2 amount of Email originating in or transmitted through
3 other countries has changed since the passage of
4 CAN-SPAM? Do you think it has gone up?

5 Let's see. As you may know, the FTC works
6 closely with various international organizations to
7 monitor Email and trends. Are there any additional
8 thoughts about these initiatives or others that could be
9 under taken?

10 MR. GOODMAN: Could you please repeat the
11 question?

12 MR. DAVIS: Sure. The FTC works closely with
13 various international organizations to monitor various
14 Email trends and laws. Do you have any thoughts about
15 these initiatives or other initiatives that could be
16 undertaken? For example, could the use of immediate
17 economic restraints against spammers in other countries
18 prove effective? If so, how could this be implemented?

19 MR. BARSZCZ: This is Jim Barszcz again. Just
20 to repeat for a second, I think if we could get service
21 providers to block Port25 access and also to implement
22 outbound spam filtering, it would be a great help to
23 everybody. That's something that providers can do.

24 MR. DAVIS: Thank you, Jim.

25 MR. DAILEY: This is Tom Dailey from Verizon.

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1 To state the point a little more generally, I think the
2 more you can force mail through legitimate MTAs and
3 ISPs, the more control you're going to have over the
4 amount of spam that's coming out of any particular
5 country's ISP base, largely because a lot of spammers
6 occupy dynamic space, and so our that's our observation.

7 MR. DAVIS: Does anyone think that stricter
8 standards for domain name registrars might aid in
9 addressing the spam problem?

10 MR. HALPERT: This is Jim Halpert. Yes, that's
11 been one of the concerns of our members. It's also a
12 significant issue for phishing.

13 MR. DAVIS: Okay. Any other thoughts or
14 comments about the international dimension to spam and
15 the effectiveness of the Act with regard to that?

16 MR. HALPERT: This is Jim Halpert. In terms of
17 encouraging cooperation also among law enforcement
18 authorities in countries where the ISP industry is more
19 fragmented would be helpful. As spammers begin to go to
20 the equivalent of lawless states to conduct their Email
21 activity, it's helpful if there isn't a centralized ISP
22 industry, and there are small players whose connectivity
23 are used by spammers to be able to go to law enforcement
24 authorities and be able to obtain evidence.

25 MR. DAVIS: Thanks, Jim.

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1 MR. KORNBLUM: Aaron Kornblum of Microsoft.
2 Just to add or supplement that answer, training is
3 equally as important to help Internet service providers
4 and government agencies in other nations to help
5 understand the problem, how to investigate spam and how
6 to pursue spammers that might be in their jurisdiction.

7 MR. DAVIS: Thanks, Aaron. Well, we'll move on
8 now to the third of three specific issues that Congress
9 asked us to look at in this report, which we'll be
10 submitting to them in the next few months.

11 This issue relates to protecting consumers,
12 including children, from the receipt and viewing of
13 commercial Email that is obscene or pornographic, and
14 you may know the FTC released a rule in April of 2004
15 dealing with a mandatory label, sexually explicit, and
16 we released that rule pursuant to the CAN-SPAM Act, and
17 we're wondering whether you think that has been
18 effective in protecting consumers, including children,
19 from receiving and viewing obscene or pornographic
20 Email.

21 MR. ST. CLAIR: This is John St. Clair from
22 Microsoft. Just a quick anecdote on that. I think
23 personally the answer is, no, because I have yet to see
24 and receive any spam personally or be aware of any spam
25 that has used such labels, so that's just my personal

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1 experience, but I have to say, no, because I don't think
2 people are using the labels that would then protect
3 people from then viewing that material.

4 MR. DAVIS: I don't know. Is it possible your
5 filter is just not showing it?

6 MR. ST. CLAIR: It is possible, yes. However,
7 it is also likely that people that are going to send
8 such material are not going to use those labels because
9 if they were, they would be flattered out, so I guess
10 what I'm trying to say is I have not received material
11 that may be deemed offensive, but at the same time, I'm
12 also not aware of not receiving it and having the labels
13 on there that would then have it filtered out.

14 I don't think it's being used, and it's not also
15 reaching me without it being used.

16 MR. HALPERT: This is Jim Halpert, and I'll
17 speak by personal experience as well, to personal
18 experience as well here. The Email that makes it
19 through to our office computers at DAL Piper Rudnick,
20 and we have many thousands of people who work at that
21 domain now, so it's a target for spammers -- but the
22 Email that makes it through the ISP filters in Possini,
23 and this is actually sexually explicit, is never
24 contained in the ADV adult label in my experience.

25 I probably receive two or three of these Emails

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1 every month, and I've never seen one bearing that label.

2 MS. ARCHIE: This is Jennifer Archie. I think
3 the better audience for that would be within the
4 subscriptions to porn community, which there is a large
5 number of people in America that subscribe and ask for
6 that sort of content, whether they're getting the sort
7 of labeling on their messages where you would see the
8 labels. It would be the legitimate quote, unquote,
9 adult content people using some kind of marketing, doing
10 any kind of Email marketing.

11 We've seen a dramatic drop in the amount of porn
12 kind of forcing its way into a member's inbox. There is
13 a fair amount, obviously it's unlabeled, but adult
14 material forcing its way into chatrooms and into instant
15 messaging. That's perhaps been an effect of CAN-SPAM
16 that is the kind of root for attempts to get the public
17 exposed to that material, seeing if you can get kids to
18 click on it.

19 It's shifted over to IM and chatrooms in large
20 part.

21 MR. DAVIS: Can anybody comment on the extent to
22 which ISPs may be filtering on the FTC's mandated
23 explicitly sexual label?

24 MR. BARSZCZ: This is Jim Barszcz. We use an
25 industry-leading vendor for our spam filtering, and they

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1 don't share with us their criteria for filtering. I can
2 say from my recollection that I have seen in my screened
3 mail folder messages with subject lines, containing the
4 label "sexually explicit."

5 I just went to check, and I don't have any
6 examples today, but I do think some of that is being
7 sent and some of it is being filtered out.

8 MR. GOODMAN: So this is Joshua Goodman from
9 Microsoft. I think it's worth mentioning a couple of
10 related trends, so one is that an increasing number,
11 maybe even most modern Email clients do some sort of
12 image blocking. They don't block all images, but they
13 do block many images, and so if somebody does send
14 sexually explicit material, it's less likely that the
15 recipient will see it, unless they opt-in, unless they
16 say, Yes, show me the image, for instance.

17 We've also seen a trend in fewer graphic
18 pornographic spams and fewer pornographic spams overall,
19 so it may be that pornographers want to comply with the
20 Act. They realize that they'll be filtered if they do,
21 and they simply give up or it may just be that there are
22 other trends. It may be that porn spam is generally
23 less effective now as people have already seen
24 whatever they might be tempted to click on, but for
25 whatever reason we're seeing a decrease in porn spam in

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1 general.

2 MR. HALPERT: This is Jim Halpert. I don't know
3 if this is what's going on in the minds of people in the
4 industry, but the CAN-SPAM has made sending porn spam a
5 relatively high risk activity in terms of criminal
6 prosecution between the ADV Adult and the falsification
7 provision, and so people who are legally sophisticated
8 and concerned about criminal prosecution might pursue
9 other ways of disseminating pornography because this has
10 opened up new tools for prosecutors to pursue the porn
11 spam industry that are not available in other contexts.

12 MR. DAVIS: Thanks. Are there any additional
13 comments on the private sector tools made available
14 perhaps by ISPs or Email service providers that shield
15 consumers from obscene or pornographic Email? Any
16 thoughts on the effectiveness of any software that
17 disables links in Emails sent by those not in the
18 subscriber's address book?

19 MR. GOODMAN: This is Joshua Goodman from
20 Microsoft again. Just to repeat what I said previously,
21 most of our current Email clients do block at least some
22 images, and that is effective in reducing the number of
23 people who inadvertently see pornographic images.

24 MR. DAVIS: Thanks, Joshua.

25 MR. BARSZCZ: This is Jim Barszcz. About half
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1 of our users use a web mail interface, and we have
2 offered an ability to not display HTML, and to switch
3 off images as well. So the protection against offensive
4 images is available not not only in clients but it's in
5 web mail as well.

6 MR. DAVIS: Do you have any names that you would
7 like to provide of those products?

8 MR. BARSZCZ: The web mail is our proprietary
9 web mail interface for our customers.

10 MR. DAVIS: Okay. It's known as web mail?

11 MR. BARSZCZ: The webmail interface we offer our
12 members is called the AT&T Message Center.

13 MR. DAVIS: Okay. Thank, Jim.

14 MR. GOODMAN: This is Joshua Goodman. To name
15 another product, Microsoft Outlook has some image
16 blocking.

17 MR. DAVIS: Thanks, Joshua.

18 Okay. Any other thoughts on the pornographic
19 Email and the effectiveness of the CAN-SPAM Act to
20 protect consumers?

21 Why don't we move on to the fourth topic then,
22 and it deals with the effectiveness of the various
23 provisions of the Act, and there are several of them.
24 Most of them are civil provisions. We would like to
25 march through them one by one, and if we do that, we

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1 come first to the criminal provisions, and we would like
2 to discuss whether these provisions achieve their
3 purpose, how effective they have been and whether there
4 are any concerns about the enforcement of any of the
5 criminal provisions or any of the criminal penalties
6 provided in the CAN-SPAM Act.

7 MR. HALPERT: This is Jim Halpert. As the
8 person who helped draft this provision working with the
9 Senate Judiciary Committee Staff, along with others who
10 are concerned about this problem, there hasn't been
11 enough enforcement. These are very effective, as
12 Jennifer Archie explained, at covering all the ways that
13 spammers try to trick ISP filters and falsify their
14 identity to get spam through and hide their trails, and
15 spammers violate these provisions pretty regularly, and
16 it's just a matter of devoting resources.

17 ISPs stand ready to work with law enforcement to
18 help them put together cases, and there have been a few
19 criminal prosecutions under state law in Virginia, but
20 the record here thus far has been disappointing in terms
21 of the IP industry stands ready to work with law
22 enforcement and to help wrap cases up and above for
23 prosecutors, but prosecutors have not used these tools,
24 which are very still applicable and very well drafted
25 for the problems that are raised by spam that are

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1 getting into end user's inboxes, and it would be great
2 if there were additional resources available and some
3 additional interest in the Department of Justice in
4 prosecuting spammers who regularly engaged in these
5 crimes.

6 What the Act has drafted effectively catalogs
7 what spammers are doing.

8 MS. ARCHIE: The criminal provisions.

9 MR. HALPERT: Yes, yes. That was Jennifer
10 Archie.

11 MS. ARCHIE: Jennifer Archie.

12 MR. KORNBLUM: This is Aaron Kornblum at
13 Microsoft. One of the things that we've started to
14 think about here is the wording of the criminal
15 provisions concerning open proxies which set numerical
16 requirements, numerical thresholds concerning the number
17 of messages that must be sent to a particular open proxy
18 in a given period of time, and that's what we've started
19 to think about is that language concerning the
20 particular single open proxy.

21 One of the things that we have seen with the
22 increased use of zombie or infected machines that send
23 spam is actually a reduction in the number of individual
24 messages being sent through any given infected machines,
25 and simply an increase in the number of machines that

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1 are infected and then mail is sent through.

2 So something that we've been thinking about is
3 perhaps to redefine the number of messages through a
4 particular machine in a given period of time or perhaps
5 rather to aggregate or simply to prohibit sending mail
6 through open proxies, rather than just through a single
7 IP, it could be through a single machine or group of
8 machines to more broadly define that because I think
9 that's one of the techniques that we have observed
10 spammers utilizing to spread the wealth, so to speak,
11 across a larger number of machines sending a smaller
12 volume of mail through a single machine.

13 MR. DAVIS: Thank you.

14 MR. HALPERT: This is Jim Halpert. Personally I
15 don't have the CAN-SPAM Act in front of me to comment on
16 that, but I believe it's possible to aggregate the
17 volume of messages among multiple machines.

18 MS. ARCHIE: Attributable to a particular actor.

19 MR. HALPERT: Yes, but we can get back and
20 supplement the record. Aaron, if you Email me your
21 contact info, I'll be happy to talk to you off line
22 about it.

23 MR. KORNBLUM: Terrific. This is Aaron
24 Kornblum. I would echo those comments concerning
25 increased support from DOJ for enforcement. I think

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1 that criminal enforcement is critical to the success of
2 the law, and the more that criminal enforcement action
3 can be taken to state and federal level, the more of a
4 deterrent message that will be created and sent to
5 spammers or to would-be spammers.

6 MS. ARCHIE: This is Jennifer Archie for America
7 Online. Anecdotally, I've never had an interaction with
8 a prosecutor where you really were telling them the
9 particular facts relating to a particular spam
10 conspiracy where they couldn't readily perceive the
11 criminality of the conduct and that it was something
12 worthy of their attention.

13 When you are able to engage in that kind of a
14 detailed dialogue, often it becomes a resource question
15 for them, if there's any loose ends that are needed to
16 be tied up, owing to the difference between the civil
17 burden of proof and a criminal burden of proof. That is
18 difficult for them to get grand jury time, to get the
19 resources to do search warrants, to get prosecutors
20 really focused.

21 You can have very committed agents and then a
22 prosecutor decides they're moving on to something else,
23 but they always are able to understand the criminality
24 of the conduct and that it's worthy of the federal
25 government's attention. The second point I'd make is

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1 that until you're able to engage with them on a detailed
2 level about a particular case, there is an impression
3 that this is not criminal conduct and that spam of
4 innocent people should simply delete it. All of us who
5 live and work in this field, day in day out, have grown
6 accustomed to treating this as a serious criminal
7 matter, deserving of felony sentences. But prosecutors
8 out there don't view it that way.

9 I think until you engage them on the specifics,
10 they may think of it as kind of a useful search warrant
11 tool or something that can be an arsenal, but they would
12 much rather bring an identity theft case or maybe
13 something under a different statute.

14 We did have one experience with the Southern
15 District of New York where the judge even was going to
16 reject the plea under CAN-SPAM. Simply not
17 understanding it at all, I think he thought that somehow
18 the content of the spam message had to be deceptive or
19 something. With the help of the Department of Justice,
20 the prosecutor, who did a quick step back and wrote a
21 very substantial letter to the judge, and he quickly got
22 on board. All by way of saying that it's not
23 instinctive to a prosecutor that this is a topic or the
24 sort of case that he or she is going to make her career
25 by bringing.

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1 MR. HALPERT: Although Elliott Spitzer figured
2 it out. This is Jim Halpert. There have been a number
3 of state prosecutions, one in New York and one in
4 Virginia, but what's important for the public to
5 understand and in particular for the law enforcement
6 community to understand is that the way the spammers get
7 their Email messages through the consumers involve fraud
8 and involve hacking.

9 And those are the tools of the spammer's trade,
10 and it's important to criminalize not the sending of
11 spam but hacking and fraud in situations that cause
12 tremendous economic burdens and serious inconvenience
13 and sometimes harassment of consumers.

14 MS. ARCHIE: If the State prosecutor who did the
15 two-week jury trial in Virginia was not currently
16 serving active duty in Iraq, I think he could be put on
17 the road to explain this to all prosecutors just how
18 simple and successful this was and it was very easily
19 presented to a jury over two weeks. They
20 quickly grasped it, drove right to the heart of it, were
21 not distracted by any of the issues that the media would
22 say what they might think the real issue was as to why
23 spam should be criminal.

24 These are good cases to bring. I think it's a
25 good story to tell, but the federal prosecution

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1 resources are stretched pretty thin.

2 MS. HARRINGTON-MCBRIDE: This is Katie. I would
3 chime in say that Rusty McGuire is a terrific guy, and I
4 can tell you that he came to spam prosecution from a
5 totally different legal realm and get up to speed on it
6 very quickly, and I think would be a terrific guy to
7 send on the road. I hope we can get him back soon.

8 MR. DAVIS: Are there any further thoughts on
9 the effectiveness or enforcement of the criminal
10 provisions and the criminal penalties in the CAN-SPAM
11 Act?

12 MS. MANSOURKIA: Please use them.

13 MR. DAVIS: I'm sorry, what was that?

14 MS. MANSOURKIA: This is Maggie Mansourkia. I
15 said please use them.

16 MR. DAVIS: Thanks, Maggie. Let's move on to
17 the civil provisions, and we'll start with the
18 prohibition in the Act on false header information in
19 any transactional or relationship or commercial
20 electronic Email message. Any thoughts about the
21 effectiveness or the enforcement of that particular
22 prohibition?

23 Well, there is similar prohibition in the act,
24 and that's the prohibition on deceptive subject lines.
25 Do you have any thoughts on the effectiveness or

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1 enforcement of that particular provision?

2 MR. GOODMAN: This is Joshua Goodman. I'll just
3 say that I think that it's a fantastic provision in the
4 sense that it puts spammers in sort of a catch 22.
5 Either they can use a non deceptive subject line, which
6 is going to make many fewer people open their mail or
7 they can use a deceptive subject line and risk violating
8 the Act. So I think it's extremely helpful.

9 MR. DAVIS: Thank you. There are a few
10 additional requirements that are related. One is that
11 the Email should contain a functioning return address or
12 other opt-out mechanism that must work for 30 days, and
13 there's also a safe harbor written into the Act so that
14 there's a temporary unavailability, that does not
15 constitute a prohibition.

16 So this is a provision about the return address
17 and the opt-out mechanism. Any thoughts about the
18 enforcement or the effectiveness of that or perhaps any
19 data about the compliance that you may be aware of, the
20 compliance of senders of commercial Email with that
21 requirement?

22 The similar prohibition is on the transmission
23 of commercial Email after the consumer has opted out.
24 There's a ten-day window currently for that. Any
25 thought on the effectiveness of the enforcement or the

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1 compliance with that particular provision?

2 MS. BOWLES: Well, this is Elizabeth Bowles with
3 Aristotle, and I can't really speak to compliance, and
4 if it's a legitimate company, I think they do comply. I
5 haven't had an experience personally or heard of
6 experiences from our customers where they've opted out
7 from a legitimate company, and then subsequently
8 received an Email.

9 I do want to say for the record, however, that
10 ten days is really too long. It doesn't take ten days
11 to opt anyone out, and that's been our position since
12 the law was drafted, and I just want to get that in
13 there here, too. There's no reason that that can't be
14 done in a much shorter period of time.

15 When we transmit newsletters on behalf of some
16 of our web hosting clients, we can opt them out almost
17 immediately, certainly within 24 hours. It should not
18 take us ten days, and in ten days you can send a lot of
19 spam.

20 MR. INGIS: This is Stu Ingis for Time Warner.
21 I think that there are considerable number of businesses
22 who have a different position on that issue, and while
23 it may be functionally possible for your company to
24 respond in a shorter time period than ten days,
25 operationally it's very difficult for a number of

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1 people. Of course that was all filed in the comments on
2 discretionary rulemaking, but I just wanted to be clear
3 on that also.

4 MS. MANSOURKIA: This is Maggie Mansourkia. I
5 think there are many reasons why a company would not be
6 able to comply in any less than ten days, and as Stu
7 mentioned, the record is pretty clear, certainly from
8 MCI 's standpoint. We provided a good bit of
9 information on instances where a company that's not very
10 small and very limited to one line of business wouldn't
11 be able to do it in less than ten days.

12 So we can certainly reiterate everything that we
13 provided to the record before, but I think a review of
14 our comments on that issue would provide more than
15 enough evidence as to instances of why many legitimate
16 companies would really need the full ten days.

17 MR. INGIS: One more point on that, Stu Ingis
18 again. To our knowledge, there is no record of abuse of
19 when somebody has opted out, abuse that in seven more
20 days a lot of messages are being sent in that window.
21 We're not aware of anything that's been put in the
22 record on that point.

23 MR. DAVIS: Okay. There's another provision in
24 the Act that has three subparts, and they basically deal
25 with sort of identification. The first one is that the

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1 commercial Email should include an identifier indicating
2 that it's some sort of ad or solicitation. Do you have
3 any thoughts about the effectiveness or enforcement of
4 that provision?

5 MR. HALPERT: This is Jim Halpert. Usually it's
6 apparent on the face of most Emails, other than ones
7 that are deceptive, whether or not they're commercial
8 Email or not, and so the provision, it becomes a
9 standard footer that is provided in legitimate Emailer's
10 Email, but in terms of being a really effective tool to
11 protect consumers from spam, it's really much more the
12 methods that are spammers are falsifying the route that
13 a message takes or their identities when they send a
14 message that are the potentially effective provisions of
15 CAN-SPAM that are effectively worse.

16 MR. DAVIS: There's another requirement for
17 clear and conspicuous notice of the ability to decline
18 to receive further Emails such as through opt-out. Any
19 thoughts on the effectiveness or enforcement of that
20 identification requirement?

21 The third similar requirement is that the
22 commercial Email include the valid physical postal
23 address of the sender. Any thoughts about the
24 effectiveness of that provision?

25 MS. MANSOURKIA: This is Maggie Mansourkia. I
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1 guess, just so we don't have continued silence, I will
2 say that I don't know of any single provision that has
3 served to be kind of an end all, be all provision that's
4 going to solve this.

5 All of these provisions rely on the notion that
6 everyone who has sent commercial Email is law abiding
7 and that's simply not the case. I think what you will
8 see and what we've seen is that most established
9 legitimate businesses, I would even venture to say all
10 legitimate established business, are putting in the
11 resources to comply or are doing whatever it takes to
12 comply, but that's not where you have the spam problem.

13 The companies or the Emails that I guess get
14 caught up in my filter and I suspect most others'
15 filters are the ones which aren't complying with
16 anything, so reducing the numbers of days for opt-out
17 wouldn't make a difference because they are still
18 violating other provisions of the Act. To somehow mess
19 with the postal address requirement wouldn't have much
20 impact because again there are other provisions.

21 Again during our comments we supplied a good bit
22 of evidence that when someone is not complying with the
23 CAN-SPAM Act, they're not just missing one provision for
24 the most part. They are outright just simply ignoring
25 it. So there is more than enough evidence to be able to

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1 carry an enforcement procedure against some of these
2 more established spammers.

3 MR. HALPERT: This is Jim Halpert. Just to
4 supplement that, it goes again to more of the Act which
5 in our view is really in terms of fighting spam, which
6 is really the criminal provision, the falsification
7 prohibition, and that is common to all of the spam that
8 consumers are complaining of, and if it's possible to do
9 more effective enforcement of that, to the extent that
10 law can play a role supplementing technology, it really
11 plays into enforcement of the falsification provisions
12 because those are the ones that distinguish the
13 activities of bad actors.

14 The bad actors who don't include an opt-out are
15 falsifying their Emails, regardless of whether or not
16 they include the opt-out, but usually they comply with
17 nothing, and they're violating the falsification
18 provision, so in the view of our members, those are the
19 core parts of the Act, and it's very important that they
20 be enforced.

21 MR. DAVIS: Well, we spoke about the criminal
22 penalties earlier. Let me ask you if you have any
23 thoughts about the civil penalties that can be obtained
24 under the Act, whether they are adequate, effective and
25 any comments about their enforcement?

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1 MR. HALPERT: This is Jim Halpert again. One
2 point that may relate to the activities of professional
3 spammers, because spammers use a bunch of shell
4 corporations often to move assets around through,
5 because they are not as effectively deterred through
6 civil enforcement, to the extent there was any tweak in
7 enforcement, perhaps making some of the criminal
8 offenses that were not discharged or for which judgments
9 would not be dischargeable in bankruptcy might be one
10 additional incremental tool in terms of civil
11 enforcement, if that were tied to civil enforcement, but
12 other than that I don't think that there really -- it's
13 certainly possible to get substantial judgments.

14 Jennifer Archie has brought a significant number
15 of cases to speak to that, but just looking at the tools
16 in the Act right now, it's fairly comprehensive. Do you
17 agree, Jennifer?

18 MS. ARCHIE: We have challenged people through
19 bankruptcy, the defendants through bankruptcy where we
20 have judgments, and they've tried to evade them, and
21 we've always had a federal district judge agree with us
22 that it's a non dischargeable offense because there's
23 some Lanham Act or similar component. But it just
24 making law district by district, case by case. If it
25 were expressed that that was non dischargeable, it would

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1 be helpful. I know that Microsoft may have the most
2 current experience on the bankruptcy and interactions in
3 their case with Scott Rictor.

4 I think it's really important that when civil
5 action is taken against the spammer, that the litigant,
6 that plaintiffs see it through to a very punitive
7 outcome. One of the best things about the Act is that
8 it eases a private plaintiff's burden of proof to obtain
9 a substantial punitive outcome that's appropriate, given
10 the level of criminality that is involved in the
11 underlying conduct.

12 It's very important that we actually see these
13 through so that the spammers decide they don't want to
14 try to force their messages on to that brand anymore
15 because it's simply become too costly. You take their
16 stuff. You take their money.

17 MR. HALPERT: And their fortune.

18 MR. KORNBLUM: This is Aaron Kornblum at
19 Microsoft. Yes, we've had similar experiences
20 concerning spammers in bankruptcy, Scott Richter being
21 the most recent, but I think it is important to have, if
22 possible, and in addition set forth that clearly
23 bankruptcy is not a forum where spam debt can be
24 discharged, and rather than creating the district-by-
25 district patchwork of rulings along those lines, it

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1 would be helpful to have in addition to the Code (11
2 U.S.C.) or either the bankruptcy code or the CAN-SPAM
3 specifically prohibiting the discharge of bankrupt spam
4 debt in the bankruptcy process.

5 MR. DAVIS: Let me go slightly off track for a
6 second and ask what you think might be the best way for
7 us to try to get a comprehensive list of all the
8 lawsuits ISPs have brought under CAN-SPAM to date.

9 We've seen press releases and articles, but
10 we're not sure that we've had the ability to identify
11 each and every lawsuit that's been filed. We would like
12 to be aware of that, those numbers, those jurisdictions
13 as we draft our report.

14 Does anything occur to you on a way that we
15 could get comprehensive lists?

16 MS. ARCHIE: There is Jennifer Archie for AOL.
17 We would certainly be willing to make a list for the
18 cases that we filed and the defendants. It's probably
19 less significant what the number of cases we filed as
20 opposed to the number of actors we've been able to
21 identify in name because often they're filed in the
22 first instance as a John Doe case, with John Does 1
23 through 25 or 1 through 50, and we do our best to assess
24 the size of the conspiracy, but I think the more telling
25 statistic would be how many anonymous bad actors on the

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1 Internet were unmasked through the subpoena powers that
2 are available under a CAN-SPAM law.

3 MR. DAVIS: We would appreciate that, yes.

4 MS. BRADY: This is Betsy Brady from Microsoft.
5 One thing is, we have been trying to provide copies of
6 the suits that we filed as we proceed, and that's one of
7 the things that the Commission , awhile back, identified
8 as being of use to them.

9 I think probably having another conversation
10 like that in terms of the practical things that would be
11 helpful to you that the ISP community can provide might
12 be called for on a regular basis. We could get together
13 and see what might be useful, but we're happy to provide
14 a similar list, although I think we've been trying to
15 provide you information all along.

16 MS. HARRINGTON-MCBRIDE: Betsy, this is Katie.
17 You're exactly right, and you know we're sort of a high
18 rope over here on this project because there are so many
19 mandates to the FTC under the CAN-SPAM Act, there are
20 numerous things we are working, and I know that I have
21 had overlap on other projects with you, and we don't
22 want to be duplicative, but really for our purposes in
23 this report, we want to be sure to count all the beans.

24 MS. BRADY: I got you. That makes perfect
25 sense.

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1 MS. HARRINGTON-MCBRIDE: So we can certainly try
2 to coordinate offline about the best way to do that. We
3 don't mean to create any additional work for you. Just
4 sort of if you're keeping a tally of, We brought this
5 many actions, we've identified this many defendants,
6 that alone would be enough for us. We don't need all
7 the underlying documentation.

8 MS. BRADY: Great. That makes perfection sense,
9 and let us see what we can do for you.

10 MS. HARRINGTON-MCBRIDE: Thank you.

11 MR. DAVIS: Back on track, we're almost done
12 with the provisions. There is a provision for
13 aggravated violations that relates to harvesting
14 dictionary attacks, zombies, et cetera. Any thoughts on
15 the effectiveness or enforcement of that provision?

16 Next in the line is the requirement that the FTC
17 create a rule dealing with sexually explicit Email
18 messages, so we do have that rule requiring the sexually
19 explicit label and the Brown Paper Wrapper. Any further
20 thought on the effectiveness or enforcement of that?

21 The Act also prohibits the promotion of a
22 person's trade or business in a commercial Email
23 message, the transmission of which violates some of the
24 above provisions such as false or misleading header
25 information, and this is for FTC enforcement only. Any

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1 thought on the effectiveness or enforcement of that
2 provision?

3 Let me ask about preemption, the Act preempting
4 state laws except those that are not specific to Email.
5 Any thoughts on the effectiveness, the enforcement, the
6 advisability of preemption?

7 MS. BOWLES: This is Elizabeth Bowles with
8 Aristotle. I think that preemption is a difficult
9 question because I know we're headquartered in Arkansas,
10 and our Attorney General was ready to be very aggressive
11 about spam, and our Act, we had an anti-spam Act that
12 was going to go into effect, and they were going to try
13 to bring a lot of criminal prosecutions, and they had
14 some impact lined up.

15 After CAN-SPAM passed they basically said
16 there's really no point, we're wasting our resources on
17 this if the federal government is going to come in and
18 essentially take it over. I know that other State
19 Attorneys General have not had that reaction, but that
20 was the reaction at least here, and I think that goes
21 back to the point that was made earlier about getting
22 the DOJ to do criminal prosecution.

23 I think that the State Attorneys General were
24 the most aggressive in going after the spammers and
25 trying to do something criminally about the spam process

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1 and local prosecutors, and that essentially I believe
2 was short circuited by the preemption provision of
3 CAN-SPAM.

4 I don't know that the Act would be completely
5 effective without the preemption provision. I just know
6 that that was the impact at least in this state.

7 MR. HALPERT: This is Jim Halpert. I think
8 that's unfortunate because that's not what the CAN-SPAM
9 Act actually provides.

10 MS. BOWLES: No, I'm aware of that.

11 MR. HALPERT: First of all, it gives state AGs
12 the ability to bring enforcement actions under
13 CAN-SPAM with very substantial damages. Secondly it
14 leaves a lot of room for states to prohibit
15 falsification in Email as well as Act's of computer
16 fraud and hacking, which goes to all of the activities
17 which characterize the spammers that consumers are
18 worried about.

19 So there have been state laws in Maryland and in
20 Ohio that have passed cataloging the falsification
21 offenses with lower thresholds, by the way, Aaron, than
22 in the federal law, just the volume of messages.
23 California has passed a civil prohibition against
24 falsified Email, including prohibited falsified subject
25 lines, and these types of laws will likely prove not be

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1 preempted, and a bunch of states are already
2 legislating.

3 The bigger issue is whether state AGs actually
4 have the resources to go after this activity, and
5 obviously the Attorneys General in New York and Virginia
6 are to be commended for their work in this area, but
7 it's much more of a resource question at the state level
8 than a question of whether CAN-SPAM preemption in any
9 way hamstrings state enforcement.

10 MS. ARCHIE: Where there are local corporate
11 victims, they can often get very interested in it. You
12 have a guy like in New York state, this particular
13 Attorney General has made computer crimes a focus of his
14 and choose to make a name for himself in the area, and
15 it was successful, so there certainly is no experience
16 to suggest that State Attorneys General would be unwise
17 to spend resources in the area.

18 I think again it's a question of finding the
19 local hook in their jurisdiction, either a local
20 defendant or a local business that's being badly harmed
21 by it and getting them motivated. They do need a little
22 bit of help from an ISP or someone who is more expert at
23 how you unmask these anonymous Internet bad actors. The
24 best hope for enforcement is to energize Attorneys
25 General in partnership with the FTC and ISPs. They have

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1 a wonderful choice of tools.

2 They can go with one of their local statutes,
3 which is what happened in Virginia. They chose to
4 prosecute under one of their new felony provisions, but
5 CAN-SPAM is available to them as well.

6 MS. BOWLES: Yes. This is Elizabeth again. I
7 do want to clarify. I actually agree with everything
8 that Jim and Jennifer just said. My only point was
9 actually that sometimes interesting then is difficult
10 because it is a resource question, and if you are a
11 smaller state that doesn't have the resources of a state
12 like New York, it is difficult for the Attorney General
13 to justify that when there is another prosecutorial
14 agency that has primary jurisdiction. In other words,
15 if they bring a hot case and they can be preempted by a
16 federal agency, then they have wasted resources.

17 So it makes it a higher burden for us to get
18 over to convince them to take the case in the first
19 place because they can have that enforcement action
20 taken away, and that's enough for them not to want to
21 spend their resources on it when they have so much else
22 that they need to deal with as well.

23 MR. DAVIS: Okay. Well, the last provision that
24 we wanted to ask you about is the requirement that the
25 Federal Communications Commission issued a rule to

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1 protect consumers from unwanted mobile service,
2 commercial messages. Any thoughts about that rule? I
3 believe that was released a year ago last September, the
4 effectiveness or the enforcement, any thoughts about
5 that?

6 MR. INGIS: There is Stu Ingis for Time Warner.
7 You know the rules, of course, have all been promulgated
8 there. There has been some issue, and I think the FCC
9 is attuned to this and has been working on it, but since
10 you're doing the report to Congress, as to making sure
11 that entities that actually sign up and put domain names
12 on the registry for wireless domains, in fact that those
13 domains are specific to mobile service commercial
14 messages, which of course as we know is the newly
15 created category by this Act.

16 The initial registry, there were some domains
17 placed on there that swept in a whole bunch of dual
18 purpose stuff, which is wireless and non wireless
19 messages, and I think that's been cleaned up, but
20 there's not much of a procedure in place to check that
21 out, so again the FCC I think has been very helpful,
22 once it's been brought to their attention, but I wanted
23 to point it out here.

24 MR. DAVIS: Thank you.

25 Well, that concludes specific questions that we

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1 have about the effectiveness of various provisions of
2 the CAN-SPAM Act.

3 In general, are there any data sources, any
4 individual studies or articles that you would recommend
5 that we review? We've been doing like Lexus Nexus
6 searches. We've going to lots of web sites. We plan to
7 go to Joshua Goodman's site where all the papers are
8 available from the conference from last week.

9 If there is anything that occurs to you that you
10 would like to make us aware of now or later, you can
11 speak up. I'll also give you my Email address once
12 again. It's mdavis@ftc.gov, M D A V I S @ F T C . G O V,
13 and hearing from you in the next few weeks would be most
14 useful to us as we draft, but if things come up in the
15 call that you think are new or important, certainly send
16 them our way as well and we'll take a look.

17 MR. HALPERT: Excuse me just one second, Mike.
18 This is Jim Halpert again. There is one point that we
19 didn't discuss that may be relevant to your report.

20 MR. DAVIS: Okay, Jim.

21 MR. HALPERT: It's that the problem of password
22 phishing Emails on the Internet has increased
23 substantially since the passage of the CAN-SPAM Act. To
24 the extent that there was anything that Congress might
25 want to look at in revising the law, this may be an area

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1 that's suitable for considering enforcement tools.

2 Specifically, because while one can send a
3 phishing Email, and that's probably a Lanham Act
4 violation, often the ISP that actually bears the brunt
5 of a lot of the Emails that are coming is not in a
6 position to sue under the Lanham Act, so that the only
7 tool that the ISP has available to it are trespass
8 action, basically under state common law if there's a
9 qualification involved.

10 This is a particular potential harm to consumers
11 and harm to trust on the Internet that may be an
12 appropriate subject of narrowly tailored specialized
13 legislation, but if there's something in terms of your
14 report about how can you at least Email practices have
15 changed, I don't have empirical data available right
16 now, but the volume of phishing Emails has increased
17 significantly.

18 That may be something, it's a deceptive trade
19 practice obviously, but it's a distinct criminal issue
20 to be dealt with or a problem to which ISPs should be
21 given greater enforcement tools along with trademark
22 owners with statutory damages, that this may be an
23 appropriate subject for targeted legislation.

24 MR. DAVIS: Jim, thank you. We actually do have
25 several minutes left before the end of the call, and so

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1 if anyone would like to add anything to what Jim said
2 about phishing or if anyone would like to raise any
3 issues that we may not have addressed or revisit
4 something that you have an additional thought on, this
5 would be a great time to do that, so please speak up.

6 Okay. Well, just a couple of closing thoughts
7 then. Going back to the issue of the transcript, once
8 it's available, sometime most likely in the next few
9 week, it will be circulated to all participants by Email
10 so that you'll have an opportunity to review and
11 correct. As we've said before, because there are so
12 many participants on this call and on our other calls,
13 it would be most helpful if you could make any
14 corrections in a red line format, and then send us the
15 red line, and we'll be asking for a fairly quick
16 turnaround, so that our drafting and our draft report
17 for our managers gets started up the management chain
18 well in advance of the December deadline.

19 Allyson Himelfarb will be the contact person for
20 the transcript, and she'll be in touch with you as soon
21 as the transcripts are ready.

22 MS. HARRINGTON-MCBRIDE: This is Katie. I just
23 wanted to thank everyone for your participation here
24 this morning and to thank you also for your continued
25 cooperation with the Federal Trade Commission as it goes

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1 about its mission to enforce the FTC Act and the rules
2 that it controls, all including the rule pursuant to the
3 CAN-SPAM Act.

4 It's been enormously helpful to us to learn from
5 you who are on the front lines, and over the last two
6 years in particular, but certainly our relationship
7 extends back beyond that. You all have been very giving
8 with your time and the information that you have, and I
9 think it's that partnership that, while we all
10 understand that there's no simple silver bullet that's
11 going to solve the problem of spam, I think it's a very
12 positive development that the level of cooperation that
13 we continue to see from the ISPs and others in industry
14 and the work that we're doing. I think that
15 collaboration is probably our best hope.

16 So we really do appreciate the time that you've
17 taken, and we'll look forward to continuing the work
18 with you to combat this problem.

19 MR. DAVIS: Thanks, everyone. Have a nice day.

20 (Whereupon, at 11:39 a.m. the conference was
21 concluded.)

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1 CERTIFICATE OF REPORTER

2

3 DOCKET/FILE NUMBER: P044405

4 CASE TITLE: REPORT TO CONGRESS

5 HEARING DATE: JULY 27, 2005

6

7 I HEREBY CERTIFY that the transcript contained
8 herein is a full and accurate transcript of the steno
9 notes transcribed by me on the above cause before the
10 FEDERAL TRADE COMMISSION to the best of my knowledge and
11 belief.

12

13 DATED: AUGUST 10, 2005

14

15

16 _____
DEBRA L. MAHEUX

17

18 CERTIFICATION OF PROOFREADER

19

20 I HEREBY CERTIFY that I proofread the
21 transcript for accuracy in spelling, hyphenation,
22 punctuation and format.

23

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